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In the Supreme Court of the United States

October Term, 1980

FEDERAL ENERGY REGULATORY COMMISSION AND JAMES B. EDWARDS, SECRETARY OF ENERGY,
Appellants,

vs.

THE STATE OF MISSISSIPPI, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE APPELLEE, MISSISSIPPI POWER & LIGHT COMPANY

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QUESTIONS PRESENTED

Titles I and III of the Public Utility Regulatory Policies Act of 1978 ("PURPA") require the States, acting through their regulatory authorities and courts, to adopt certain rate design and regulatory standards, or, in effect, to show cause in writing, based on substantial evidence, why the same should not be adopted. This must be done within two years, or, if not within three years, then in the first rate case thereafter; and three federal policies or purposes "supplement otherwise applicable state law"[1] and expand the discretion of the State regulatory commissions; and overriding federal procedural rules and definitions cover every facet of the trial and appeal: discovery, intervention, fees, scope of issues, amici curiae, time limitations and form of order. Under threat of fine and penalties, Section 210 of Title II of PURPA requires the States, acting through their regulatory commissions, to implement rules promulgated or revised by the Federal Energy Regulatory Commission under which regulated utilities must offer to sell electricity to and purchase electricity from qualifying cogenerator and small power production facilities at rates fixed as prescribed in such rules. PURPA imposes other mandatory duties on the State regulatory authorities and requires regulated electric utilities to furnish costly information, to pay the attorneys' and expert fees of consumers, and pay the heavy cost of compliance with PURPA, under threat of fines and penalties.

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1. 16 U.S.C. (Supp. III) Sections 2621(a) and 2623(a); and 15 U.S.C. (Supp. III) Section 3203(a).

The questions presented are whether these statutory provisions:

(a) Are the regulation of "commerce," Art. I, Section 8, Cl.3, or are the regulations of governance.

(b) Conscript the States and their officers to perform affirmative duties and otherwise implement federal policies, against their wishes, in violation of the Tenth Amendment.

(c) Impair the States' ability to function effectively in a federal system, by directly displacing the States' freedom to structure integral operations in areas of traditional government functions, as prohibited by the Tenth Amendment.

(d) Violate the guaranty of a republican form of government, by passing supplementary state law and interfering with the administration and enforcement of state law.

(e) Violate the Supremacy Clause by creating a supplementary state law which is, at once, federal-and-supreme and state-and-inferior.

(f) Deprive the regulated utilities of their property without due process of law in violation of the Fifth Amendment, by compelling compliance with an unconstitutional statute under threat of fines and penalties, and otherwise.

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OPINION BELOW

The opinion of the district court (J.S. 1a-7a) is not reported but must be considered in conjunction with the "Final Judgment" (J.S. 8a and 9a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those set forth by Appellants, also pertinent are the provisions of Article IV, Section 4 and the Fifth Amendment of the Constitution, set forth MP&L App., 1a; 16 U.S.C. (Supp. III) Section 825m, 825n, 825o, and 791a, and 15 U.S.C. (Supp. III) 797, set forth MP&L App., 7a-12a; and Sections 77-3-3, 77-3-5, 77-3-39, Miss. Code Ann. (1972), set forth MP&L App., 12a-14a.

STATEMENT

A. The Constitutional Background

This case presents a most basic issue of constitutional law as to how far Congress may go under the Commerce Power in commandeering the States to implement its policies and revising state laws by passing federal laws which "supplement otherwise applicable state law."[2] Therefore, we must begin with a brief look at the history of our Republic.

We began with the Articles of Confederation, under which there was only a league of independent states, each too jealous of its sovereignty to entrust much power to the national government. Congress was given the power to make war and treaties, to coin money, to establish a post office, but not the power to tax or to regulate commerce. Congress could only regulate the individual citizens through the agency of the States; and, when the States refused to obey the national laws, there was no way to coerce their obedience.[3]

Alexander Hamilton described the problem created by the Articles of Confederation and the solution which the Constitutional Convention of 1787 decided upon, as follows in the *Federalist*:

> "The great and radical vice in the construction of the existing Confederation, is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES and as contradistinguished from the INDIVIDUALS of which they consist. * * * The consequence of this is, that though in theory * * * resolutions [of Congress to raise

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2. *Id.*

3. Alfred H. Kelly and Winfred A. Harbison, *The American Constitution: Its Origins & Development* (W. W. Norton & Co., New York, 1976), Fifth Edition, page 96.

men and money] * * * are laws, constitutionally binding on the members of the Union, yet in practice they are mere recommendations which the States observe or disregard at their option. * * *"

"* * * We must resolve to incorporate into our plan those ingredients which may be considered as forming the characteristic difference between a league and a government; *we must extend the authority of the Union to the persons of the citizens*—the only proper objects of government.

* * *

"In addition to all this, there is, in the nature of sovereign power, an impatience of control, that disposes those who are invested with the exercise of it, to look with an evil eye upon all external attempts to restrain or direct its operations. * * *"

"If, therefore, the measures of the Confederacy cannot be executed without the intervention of the particular [state] administrations, there will be little prospect of their being executed at all. * * *."[4] (Emphasis is ours, unless noted).

The Constitutional Convention of 1787 was a power struggle between the forces favoring a strong national government and those seeking, instead, strong state governments—and a federal government was the result.[5]

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4. *The Federalist* No. XV, at 86 (Henry Cabot Lodge Edition, 1888, hereinafter cited without reference to editor).

5. See the interesting discussion of federalism by Martin Diamond, *"Commentaries on The Federalist,"* 86 Yale Law Journal 1273, 1279 (1977), defining "federalism" as understood in 1787 to mean: "having the nature of a 'league or contract,' federalism is a relation of independent equal bodies politic that join together for limited purposes and carry those out, as the Latin root (*foedus, fides*) of the word reminds us, only by the obligation of good faith, rather than by governmental, which is to say coercive, authority. Insofar as any governmental structure, process, power or practice conforms to the separate bodies politic,

(Continued on following page)

Early in the Convention, the Virginia delegation introduced fifteen resolutions which are known as the "Virginia Plan" and these proposed a nationalistic solution to the problem of defining the respective spheres of the state and national governments. The sixth resolution gave Congress the power "* * * to negative all laws passed by the several States contravening, in the opinion of the National Legislature, the Articles of Union, or any treaty * * * and to call forth the force of the Union against any member of the Union failing to fulfill its duty under the Articles thereof."[6]

A similar proposal was made by Charles Pinckney of South Carolina to give Congress "* * * the power to revise the laws of the several states that may be supposed to infringe the powers exclusively delegated * * * to Congress, and to negative and annul such as do."[7]

"The Virginia Plan also gave Congress a broad and indefinite grant of legislative authority in all cases where the states were 'incompetent.' It is not clear from the phraseology whether the plan intended to give Congress the power to alter at will the extent of its authority and that of the states; at the very least, however, *the plan proposed to solve the problem of federalism by giving Congress the power to define the extent of its own authority and that of the states.* There was to be but one

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Footnote continued—

to their equal status within the federal association, to the limited nature of that association, and to its operational dependence upon faithful compliance rather than political coercion, [it] * * * is federal; insofar as it departs towards the principle of a complete, coercive government of a single body politic, it is national." See also *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 178, 181 (1796).

6. II James Madison, *The Papers of James Madison*, 732 (Henry D. Gilpin, Supt. of Publication, Mobile: Alston Mygatt, 1842).

7. *Elliott's Debates*, 2d Ed., Vol. I, Book I, pp. 149, 400 and 401.

check upon that power: the Council of Revision was authorized to examine 'every act of a particular legislature before a negative thereon shall become final.' "[8] (Emphasis, by the authors).

Eventually both these Virginia proposals and the Pinckney proposal to allow Congress to negative or revise state laws were defeated: rather than give Congress vaguely broad powers to define its powers and revise state laws, the Convention made the defined powers of Congress as enumerated in the Constitution and the laws made in pursuance thereof "the supreme law of the land."[9]

Luther Martin and the states rights' forces brought forward the Supremacy Clause as part of the New Jersey Plan.[10]

While the framers of our Constitution could not foresee the vast expansion of the Commerce Power to the extent of encroachment upon the essential functions of the States, they were very familiar with the nature of politicians and sought to provide checks and balances against every holder of power, so that each government would protect the citizens against the other government.

The need for federalism is well stated by Alpheus T. Mason:

> "The Constitution's framers were inspired by profound suspicion of any and all power holders. 'The truth is,' Madison remarked, 'all men having power ought to be mistrusted.'
>
> * * *
>
> "What the framers established was not 'democracy the most simple' but 'the most complicated government

8. Alfred H. Kelly and Winfred A. Harbison, op. cit., page 115.

9. Article VI, Section 2, U.S. Constitution; and Alfred H. Kelly and Winfred A. Harbison, op. cit., pages 128-131.

10. *Id.*, pages 130-135.

on the face of the globe.' They called their creation *free government.* * * * [yet] it involves a complexus of controls designed to temper together * * * the * * * elements of liberty and restraint. * * *'"

"'In questions of power,' Jefferson admonished, 'let no more be heard of confidence in man [power holder] but bind him down from mischief by the chains of the Constitution.' Besides the right of revolution, these constitutional shackles include government under law, separation of powers, federalism, the Bill of Rights and judicial review.

* * *

"* * * 'You may cover whole skins of parchment with limitations,' John Randolph said, 'but power alone can limit power.'

"By 1787 experience had demonstrated that the primary control—'dependence on the people,' the ballot—was not enough.

"Federalism, American's nearest approach to a unique creation, is another device for obliging government to control itself. It is a dual system in which two authorities, nation and state, govern the same territory and the same people, each supreme in its own sphere, neither supreme within the sphere of the other. Just as the states would naturally resent encroachment by the national authority, so the central government would protect the people from the tyranny of their own state governments. * * *"[11] (Emphasis by the author).

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11. Alpheus T. Mason, "America's Political Heritage: Revolution and Free Government—a Bicentennial Tribute," in *Essays on The Constitution of the United States,* edited by M. Judd Harmon (Kennikat Press Corp., Port Washington, N.Y., 1978), p. 19.

The judicial history of our Country has been like the swinging of a pendulum between the federal viewpoint of Madison[12] and the national viewpoint of Hamilton;[13] but constitutional history teaches that the Constitutional Convention of 1787 rejected allowing Congress to commandeer the States to implement federal policies and allowing Congress to revise and supplement State laws.

B. The Statutory Background

Appellants seek to justify PURPA "as a part of a package of legislation designed to combat the nationwide energy crisis."[14] A closer scrutiny of the legislative history of PURPA reveals, however, that there was no serious deficiency in the regulation of utilities by the States requiring emergency national action: to the contrary, Appellants admit testimony by "numerous witnesses" in "opposition to federal pre-emption for a variety of reasons, including *the belief that the necessary expertise to implement substantive reforms in this area was at the state, not the federal, level* * * *." Proof of the need to save foreign oil does not prove the need to commandeer State regulatory agencies and supplement State laws in order to save foreign oil. If there had been a genuine, emergency

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12. James Madison, *The Federalist* No. XXXIX, at 238: "In this relation, the proposed government cannot be deemed a *national* one; since its jurisdiction exends to enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." See also No. XLVI, page 295, that the new federal government will "* * * be disinclined to invade the rights of the individual states, or the prerogatives of their governments."

13. While recognizing that "the State governments, by their original constitutions, are invested with complete sovereignty" (*The Federalist* No. XXXI, at 184); and that "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States (*Ibid.*, No. XXXII, at 186), Hamilton argued for a strong national government with the power to pass all necessary and proper laws to carry out its enumerated powers (*Ibid.*, No. XXXIII, at 191).

14. Br. 2.

need to reform State utility regulation, because of its substantial injury to interstate commerce, surely Congress would have pre-empted the field or, at least would have adopted the pre-emption features in the bills proposed by the Administration (Part E of S. 1469 and H. R. 6831, 95th Cong., 1st Sess., 1977) and approved by the House of Representatives (H. R. 8444, 95th Cong., 1st Sess., 1977), instead of passing the present version, under which Appellants claim "* * * there is no *requirement* that any of the standards actually be adopted or implemented."[15]

In S. Rep. No. 95-442, 95th Cong., 1st Sess., 9 (1977), the Senate Committee states:

> "At this time however, the committee felt that setting minimum federal standards for utility rates, or mandating the use of certain costing methods for rate-setting, would be an *unnecessary intrusion into an area which has traditionally been regulated by the States.* It is apparent to the committee that many State utility commissions are currently involved in innovative rate-making and are working toward the goal of conservation of energy through rate reform. *At present, the State regulatory agencies rather than the Federal Government, possess the expertise* to conduct the detailed costing and demand studies required to implement rate structure revision. Moreover, the committee recognized that *rate structures must reflect the individual needs and local peculiarities of each utilities' service area*; an appropriate rate design for Hawaii will not be appropriate for Idaho, *nor is there any national consensus as to the proper costing methodology* to be used to set rates for the various utilities. Finally the committee felt that the potential uncertainty and delays accompanying Federal regulation threatened to have an adverse impact on the financial

15. J.S. 3.

health of the utility industry which outweighed the projected savings in capital expenditures claimed by supporters of the administration's proposal."

See also the statement of Senator Johnson, quoted in our Motion To Affirm, at pp. 5 and 6.

The statement of the Chairman of the Federal Power Commission, Honorable Richard L. Dunham, appears in Senate Committee Report on S. 2114[16] and makes clear the reasons for his belief that the "* * * changes in rate design and costing methodology [proposed in Part E of S. 1469, the Administration's version of PURPA] *should not be made mandatory* at a time when the effects of such changes have not been thoroughly studied."[17] He recommended, instead, that congress should allow the Tennessee Valley Authority and Bonneville Power Administration "to operate through time-of-day, peak load pricing and related theories for a period of time and thereafter to assess what the Congress may wish to prescribe for the Nation as a whole."[18]

We also must challenge Appellants' claim[19] that PURPA was designed as an emergency measure to avoid a shortage of natural gas, since PURPA only requires certain gas utilities to consider the federal standards as to termination of service and advertising,[20] and only requires the Secretary of Energy to make a study of gas utility rate design.[21] The Secretary of Energy is not even authorized "to appeal or otherwise seek judicial review of the decisions of a State regulatory authority * * *,

16. S. Rep. No. 95-442, 95th Cong., 1st Sess. (1977), at 34.
17. *Ibid.*, at 35.
18. *Ibid.*, at 37.
19. Br. 3.
20. 15 U.S.C. (Supp. III) 3203 and 3204, J.S. 58a-62a.
21. 15 U.S.C. (Supp. III) 3206, J.S. 63a-65a.

[although he may] participate as an amicus curiae in any judicial review * * *."[22]

Appellants emphasize that PURPA is "* * * a federal program designed to increase energy conservation and efficient use of energy resources,"[23] thereby stating only two of the three statutory federal policies or purposes enunciated by PURPA and overlooking its third statutory purpose, "equitable rates,"[24] and the other federal regulatory policies in PURPA which have nothing to do with conservation or efficient use of energy.[25]

Nor we do not believe that Congress "determined * * * to control consumer costs"[26] by passing PURPA because Senator Jackson declared:

> "It would be nice to say that we have reported legislation which will offer some relief from this widely detested increase in consumer cost. But no one has proposed such a bill. The administration proposal will not do it. The House bill will not do it, and S. 2114 will not do it. Utility rates are going to continue to rise, both because fuel prices will continue to rise and because national policy has been unable to bring down the rate of inflation."[27]

The issue is not whether there is a need for saving foreign oil through conversion to coal or any of the other

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22. 15 U.S.C. (Supp. III) 3207, J.S. 65a and 66a.

23. Br. 14.

24. 16 U.S.C. (Supp. III) 2611(3), J.S. 16a and 17a; 15 U.S.C. (Supp. III) 3201(a)(3), J.S. 56a.

25 Such as "Lifeline Rates," 16 U.S.C. (Supp. III) 2624, J.S. 26a; "Procedures For Termination of Service," 16 U.S.C. (Supp. III) 2625(g), J.S. 32a, and "Advertising," 16 U.S.C. (Supp. III) 2625(h), J.S. 33a.

26. Br. 3.

27. Senator Jackson, Cong. Rec., October 5, 1977, S. 16373.

means utilized in the other four energy statutes;[28] the issue here is whether there is a need to commandeer the States and their agencies, and revise their laws in order to enforce federal policies as a means of saving foreign oil.

Appellants have elected to confine their argument to two grounds[29] and, therefore, have not included in their discussion of the statutory background either the unique[30] provisions of PURPA that its three federal purposes or policies "supplement otherwise applicable state law" or the laws of Mississippi which are thus supplemented.

The pertinent statutes of Mississippi appear as an appendix to our Motion to Affirm.[31] Thereunder the Mississippi Public Service Commission is given exclusive original jurisdiction over the intrastate business and property of all public utilities: including telephone, radio communication, gas, electricity, water, and sewage disposal[32] but the jurisdiction of the Commission to suspend a proposed rate increase is automatically terminated after six months.[33] The expense of the Mississippi Public Service Commission's compliance with PURPA will fall upon the customers of *all* utilities within its jurisdiction, under Section 77-3-87, Miss. Code Ann. (1980), including tele-

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28. That legislative package also included the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 *et seq.*; the National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206 *et seq.*; the Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174 *et seq.*; and the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289 *et seq.*

29. Br. 14.

30. Neither this Appellee nor the Appellants know of another such federal law which purports to "supplement" state law. Answer of Secretary of Energy to Interrogatory 10, J.A. 38; FERC's Answer to Interrogatory 10, J.A. 48.

31. Mississippi Power & Light Company App., 12a-14a.

32. *Ibid.*, 12a, Section 77-3-3, Miss. Code Ann. (1972); Affidavit of E. W. Robinson, Par. 2, J.A. 67.

33. *Ibid.*, 13a, 14a, Section 77-3-39, Miss. Code Ann. (1972).

phone, radio communication, water and sewage disposal consumers.[34]

1. Titles I and III of PURPA

The Defendants have admitted "that, as stated on page 67 of the Conference Report accompanying PURPA, Sen. Rep. No. 95-1292, 95th Cong. 2d Sess., the Act 'does not change the primary responsibility of the States with respect to electric utility rates, *but it places certain federal responsibilities and obligations on the State Commissions* in the exercise of their responsibilities.' "[35] This may be translated, we submit, as an admission that the primary responsibility of enforcing State utility laws and facing State voters is left with the State regulatory officials; but that such State officials must comply, in addition, with "certain Federal responsibilities and obligations."[36] It is of extreme constitutional significance that Congress attempts to coerce the State officials into performing some of these Federal responsibilities and obligations *by threat of fine and penalties.*[37]

Appellants' discussion of Titles I and III does not reveal the true impact of what Appellants term the "three common goals" of PURPA.[38]

Both Sections 101[39] and 301[40] of PURPA provide:

> "The purposes of this chapter are to encourage—
>
> (1) Conservation of energy supplied by [electric and gas] * * * utilities;

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34. Affidavit of E. W. Robinson, Pars. 2-5, J.A. 67.

35. Secretary's Answer to Interrogatory 6, J.A. 36; FERC's Answer to Interrogatory 6, J.A. 47.

36. *Id.*

37. 16 U.S.C. (Supp. III) 824a-3(h)(2)(A), MP&L App. 6a; and 15 U.S.C. (Supp. III) 797a, MP&L App., 10a.

38. Br. 3.

39. 16 U.S.C. (Supp. III) 2611, J.S. 16a.

40. 15 U.S.C. (Supp. III) 3201, J.S. 56a.

(2) The optimization of the efficiency of use of facilities and resources by [such] * * * utilities;

(3) Equitable rates to [their] * * * consumers."

Appellants neither mention nor discuss in their Brief or in Questions Presented the extremely important provisions of PURPA that these three federal purposes or policies "* * * *supplement otherwise applicable State law*" for purposes of any consideration and determination by the State Regulatory Agency and by the Appellate Court of whether it is appropriate to implement the Federal standards.[41]

According to the Conference Report on PURPA, "the intent [of these provisions] * * * is that where a State regulatory authority finds insufficient authority, pursuant to otherwise applicable State law, under which it may adopt a standard, *then these three purposes * * * provide such authority. In effect the three purposes expand the discretion of the State regulatory authority * * *.* However, the conferees also intend that the three purposes do not override State law."[42]

The extent of this expansion of discretion is shown by the obvious use of undefined generalities as the goals of PURPA in the DOE's "Action Memorandum" construing PURPA, in which it is said: "While the eleven 'standards' established by the PURPA are clearly defined (except for the cost of service standard) and in a manner so as not to be mutually inconsistent, *the three overriding goals cited by Congress as the objectives to be served by the standards are not clearly defined,* and, without further

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41. 16 U.S.C. (Supp. III) Sections 2621(a) and 2623(a); 15 U.S.C. (Supp. III) 3203(a).

42. *Joint Explanatory Statement of the Committee of Conference to accompany H. R. 4018,* Cong. Rec., October 10, 1978, H. 12030 and H. 12031; House Conference Rep. No. 95-1750, 95th Cong., 2d Sess. (1978); pp. 70, 71 and 75 reprinted 1978 Cong. & Ad. News 7797 (hereinafter "Conf. Rep. at p. .....").

elaboration by the Department, *could lead to contradictory policies in the actual setting of electricity rates.*"[43]

Note also the conflict as to the definition of "conservation" in the first purpose,[44] "efficiency" in the second purpose[45] and "equitable rates" in the third purpose.[46]

Appellants do not mention Section 115 of PURPA, 16 U.S.C. (Supp. III) 2625, which controls the administrative discretion of the State regulatory authorities in considering the Federal standards by compelling them to follow certain definitions.

For example, "subsection (a) describes how the cost of service is to be determined by the State regulatory authority * * * when they undertake the consideration and make the determination with respect to the cost of service under section 111 * * * [including the requirement] that the methods prescribed for determining the cost of providing electric service shall reflect differences in cost-incurrence attributable to differences in customer, demand and energy charges." (Conf. Rep. at p. 78); the federal standard on adjustment clauses is satisfied if it meets the requirements of 16 U.S.C. Section 2625(e) (i) (a); and the federal termination-of-service standard, if it meets 16 U.S.C. Section 2625(g)—notwithstanding any prior rules of the MPSC or laws of the State of Mississippi.

Appellants leave the impression that PURPA requires only that the MPSC "consider" the adoption and implemen-

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43. *Hearings Before the Subcommittee on Energy and Power of the Committee on Interstate and Foreign Commerce of the House of Representatives*, 96th Congress, 1st Session, on oversight Pertaining to the Implementation of the Public Utility Regulatory Policies Act of 1978, with particular reference to Titles I and II," June 18 and 19, 1979, Serial 96-61 (herein referred to as "Implementation Record"), page 559.

44. *Id.*, p. 564.

45. *Id.*, p. 566.

46. *Id.*, p. 568.

tation of the Federal standards.[47] Appellants have admitted, however, that "* * * each of these standards is to be considered in a hearing * * * and [that] a written statement of the reasons for declining to implement or adopt [them, must be issued by the State regulatory authority] * * * to be made available to the public."[48]

The necessary effect of this requirement under Mississippi law is to require the MPSC to adopt these Federal standards or else to show cause by written findings, based on substantial evidence, for its failure to adopt the same, because Mississippi law requires that any such finding "* * * shall be supported by substantial evidence presented in the hearing and shall be in sufficient detail to enable the court on appeal to determine the controverted questions presented by the proceeding, and the basis of the commission's conclusion."[49] And the practical effect of Section 115 is that it would be almost impossible for the State regulatory authority to consider the federal standards in accordance with the "definitions" or rules for consideration in Section 115 and be able to show cause in writing, based on substantial evidence, why such federal standards should not be adopted.

To save prolixity, MP&L adopts as a part of this Brief that said in the Brief of the State of Mississippi and the MPSC, especially their explanation of PURPA and the burden of complying with its numerous requirements.

Appellants do not discuss 15 U.S.C. (Title III) 797, which is made applicable by 16 U.S.C. (Supp. III) 2643(d) and which threatens MP&L with severe fines and penalties if it does not comply with PURPA.

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47. Br. 3.

48. J.S. 6; Conf. Rep., p. 74, discussing Section 112 of PURPA, 16 U.S.C. (Supp. III) 2622.

49. Section 77-3-59, Miss. Code Ann. (1972).

2. Section 210 of PURPA

Section 210(f) of PURPA, 16 U.S.C. (Supp. III) 824a-3(f) provides that, *within one year after any rule is prescribed* by the FERC, the State regulatory authority "*shall* * * * implement such rule (or revised rule for each electric utility for which it has rate-making authority." The FERC's Final Rules construe this as meaning "that implementation of these rules *is a continuing process and that oversight [by the FERC] will be ongoing.*"[50]

Since PURPA requires implementation of "any rule" prescribed or revised by the FERC, any latitude allowed by the FERC at this time as a matter of grace is irrelevant.

Section 210(h) of PURPA, 16 U.S.C. (Supp. III) 824a-3(h), provides for enforcement of any rule by the FERC—or, if not, by any electric utilities, qualifying co-generator or small power producer—against the MPSC under the severe penalties and fines which are set forth in MP&L App., 10a-12a; and enforcement is also allowed by injunction, mandamus or other relief deemed appropriate by the federal court.

C. The Interest of Mississippi Power & Light Company

The Mississippi Power & Light Company is "* * * a Mississippi corporation providing intrastate retail electric service to its customers in the western half of the State of Mississippi"[51] and is "on the final list of electric utilities which are covered by PURPA."[52] It intervened without

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50. Analysis of Subsection 292.401 of Subpart D, 18 C.F.R. 292.

51. Intervenor's Complaint, Par. III-6, admitted by FERC, J.A. 25.

52. Answer of FERC, J.A. 25; Answer of Secretary of Energy, J.A. 29.

objection from the other parties and is the only utility "involved in this case."[53]

Mississippi Power & Light's interest in this litigation is direct:

(1) Defendants require Mississippi Power & Light Company under Section 133 of PURPA,[54] under threat of fine and penalty,[55] to compile and furnish to the FERC at great expense marginal cost information as to its operations, which is regarded as essential to carrying out federal regulatory policies of PURPA but which is in addition to, and not related to the fully allocated cost of service information heretofore required by the FERC and Mississippi Public Service Commission.[56]

It is estimated that the cost of such compliance to MP&L will be approximately $868,000.00 for each reporting period, including the cost of each bi-annual report.[57]

(2) MP&L is subjected to a federal cause of action under Section 122 of PURPA to compensate each electric consumer who substantially contributes "to the approval, in whole or in part, of a position advocated by such consumer * * * and relating to any standard set forth in subtitle (b), * * * for reasonable attorneys' fees, expert witness fees, and other reasonable costs [including fees and costs of obtaining judicial review thereasto]."[58]

(3) MP&L is subjected to the cost of reading, understanding and complying with over five actual pounds of

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53. Although Appellants assume that the Mississippi Power Company is also "involved," Br. 23.

54. 16 U.S.C. (Supp. III) 2643, J.S. 44a.

55. 16 U.S.C. (Supp. III) 2643(d) makes applicable 15 U.S.C. (Supp. III) 797.

56. Affidavit of J. W. Schimpf, Par. 6, J.A. 73; Affidavit of E. W. Robinson, Par. 6, J.A. 67, 68.

57. Affidavit of J. W. Schimpf, Pars. 7 and 8, J.A. 74 and 75.

58. Affidavit of C. Keith Howle, Par. 15, J.A. 63, 16 U.S.C. (Supp. III) 2632.

regulations, orders and guidelines promulgated by Defendants in connection with PURPA.[59]

(4) MP&L will be compelled under Section 77-3-87, Miss. Code Ann. (1972), as amended, to pay its part of the cost of the Mississippi Public Service Commission's implementation of PURPA.[60]

(5) MP&L will be compelled to pay additional trial expense[61] and suffer regulatory lag in the trial and appeal of its rate cases, as a result of the implementation of PURPA and the intervention of the DOE and others, and PURPA's supplementation and amendment of the laws of Mississippi and rules of the Mississippi Public Service Commission as to parties and procedure.

(6) PURPA, as construed by the FERC, has required MP&L to purchase electricity from co-generators at a rate that equals its full "avoided cost" (as to facilities commenced on or after November 9, 1978)[62] and required

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59. Affidavit of J. W. Schimpf, Par. 11, J.A. 75 and 76: Exhibits "A", "B", "C", "E", "F", "G", "H", and "I", to MP&L's Motion For Summary Judgment; see also Affidavit of C. Keith Howle, Par. 16, J.A. 63.

60. Affidavit of E. W. Robinson, Par. 3, J.A. 67. And PURPA will substantially increase the Mississippi Public Service Commission's cost of operation; "it is reasonably estimated that the cost of implementing PURPA * * * over the next ten years would exceed two million dollars." Affidavit of C. Keith Howle, Par. 8, J.A. 60.

61. Exhibit "I-2" to MP&L's Motion by Summary Judgment is the Affidavit of Paul S. Gerritsen of Delmarva Power & Light Company that DOE's active intervention and participation in that Company's rate case "added approximately $150,000.00 in expenditures in the aggregate for the other parties to the proceeding in legal, consultant and out-of-pocket expenses"; and that, if the case had not been settled, "* * * DOE's active participation would have added about $500,000.00 of [such] expenditures in the aggregate for the other parties * * * [and] about 15 days to the length of the hearing." See also the Secretary's Response and Amended Response to MP&L's Interrogatories Nos. 11-14, J.A. 38, 39 and 77-79.

62. Sections 292.304(b)(2) and (b)(4) of FERC Order No. 69, February 19, 1980, Dkt. RM 79-55, thereby prohibiting the

(Continued on following page)

MP&L to provide certain types of service which may be requested by qualifying facilities to back up or supplement those facilities' own generation.[63]

The tremendous financial burden of compliance with PURPA will fall upon MP&L's retail rate payers, "a segment of the Nation's society, who, on average have the lowest per capita income according to published surveys * * *"; and the Final Regulations of the FERC prohibit the imposition of such burden upon MP&L's wholesale customers.[64]

MP&L believes that the extremely harmful impact of PURPA upon MP&L and its retail customers has been repeated across the Nation and is typical. The American Public Power Association, which represents over 1400 local public owned electric systems in the United States has stated:

> "Additional expenses for customers of larger utilities may amount to 1 percent or 2 percent. However, the amount for smaller systems covered by the Act may be *three or four times greater.*"[65]

Footnote continued—

States from allowing the other non-co-generating customers of Mississippi Power & Light to share any of the benefits of these transactions and, in effect, subsidizing the co-generators at the expense of the other customers of Mississippi Power & Light. 18 C.F.R. 292.304(b)(2) and 292.304(b)(4); 45 Fed. Reg. 12214.

63. *Ibid.*, Section 292.305; *Cf.* Section 77-3-33, Miss. Code Ann. (1972), requiring public utilities to furnish reasonable service to those who purchase utility service; the utilities being obligated to serve their customers but not their suppliers (the co-generators).

64. Affidavit of J. W. Schimpf, Pars. 9 and 10, J.A. 75. See also Affidavit of E. W. Robinson, Par. 17, J.A. 64.

65. Implementation Record, p. 21. See also comment of Dr. Kevin A. Kelly, *Id.*, at 173 and 174, that Section 133 "will require a massive 3 year data-gathering effort, the cost of which may outweigh the benefits to consumers served by all but the largest utilities."

The Acting Comptroller General of the United States has just officially reported to the Congress in part as follows:

> "*Compliance by utilities with section* 133 *requirements is expensive and burdensome.* * * * Utility officials also pointed out, and FERC concurred, that some of the information reported under section 133 duplicates other data submitted to the Federal Government. Smaller utilities have voiced concern that the requirements of section 133 are nearly as expensive for them as they are for large utilities.
>
> "There is limited current use of the section 133 filings by the Federal Government, States, special interest groups, and utilities. *The known future use of the section* 133 *filings is unclear at this time.* However, the submissions are recent—the majority of first filings were submitted in November 1980. The Federal Government, States, and special interest groups need time to examine the content, analyses, and potential use of the data contained in the filings. There are some drawbacks to the data which limit its use * * *.
>
> "After considering DOE's comments, we are recommending that FERC review and, as appropriate, revise its regulations for implementing section 133 in order to reduce the cost burden on utilities. However, if FERC shows that overall the costs to utilities to comply with section 133 are greater than the benefits (as demonstrated through the use of the submissions) to States, special interest groups, and other potential users of the filings, then FERC should request that the Congress repeal the section."[66]

In summary, PURPA confiscates the property of MP&L and its retail customers by imposing upon them

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66. September 14, 1981, EMD-81-105, pp. 19 and 21.

the vast cost of providing marginal cost information which is not needed under State law and of paying MP&L's share of the MPSC's costs for complying with this unconstitutional statute; and PURPA's unlimited potential for delaying consideration and final disposition of MP&L's vital rate cases—both before the MPSC and the courts—seriously threatens MP&L's ability to provide electric service.

D. The Proceedings Below

On April 24, 1979, the State of Mississippi and the Mississippi Public Service Commission filed this action against the Secretary of Energy and the Federal Energy Regulatory Commission in the United States District Court for the Southern District of Mississippi, seeking a declaratory judgment that the Public Utility Regulatory Policies Act of 1978 was void and unconstitutional, especially attacking Titles I and III and Section 210, as an "attempt to coerce the Plaintiffs into adopting federal standards on rate making, employing State employees and expending substantial State funds to assist x x x in enforcing the federal policies therein set forth."[67]

Without objections from the other parties, the Mississippi Power & Light Company, an electric utility regulated under PURPA, was allowed to intervene and file its Intervenor's Complaint. Therein it substantially adopted the Plaintiff's Amended Complaint[68] and additionally alleged that enforcement of PURPA would wrongfully and unconstitutionally impose on MP&L the vast cost of obtaining very complex and extensive information as to the cost of service and furnishing same to the Federal Energy Regulatory and the Mississippi Public Service Commission, under penalties imposed by 15 U.S.C. (Supp. III)

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67. Amended Complaint, Count I, p. 8.

68. Intervenor's Complaint, p. 7, Paragraph III, p. 2; Paragraph IV, p. 2; Paragraph V, p. 3.

Section 797; and the cost of enforcing PURPA (through MP&L's payment of the tax supporting the Mississippi Public Service Commission, under Section 77-3-87, Miss. Code Ann. (1980)); and the cost of intervention and participation by Defendants and others in proceedings to enforce PURPA;[69] and that consideration of PURPA's federal standards would seriously aggravate the problem of regulatory lag in the fixation of MP&L's rates by the Mississippi Public Service Commission.[70]

MP&L alleged that "PURPA violates the due process clause of the Fifth and Fourteenth Amendments; Article I, Section 8, clause 3 ('The Commerce Clause'); Article IV, Section 4 (the 'Republican form of Government'); Article VI, Section 2 (the 'Supreme Law of the Land'); and the Tenth Amendment of the United States Constitution."[71] MP&L proved the huge cost burden PURPA put on its customers. All parties then filed motions for summary judgment and the District Court granted those filed by the Plaintiffs and MP&L, and overruled those filed by the Defendants.

The District Court initially held that PURPA was unconstitutional because "this Act simply does not even attempt to regulate commerce among the several States";[72] and because this Act interfered unduly with the State's performance of its sovereign functions and compelled the State to carry out the commands of the federal government, in violation of the holding in *National League of Cities v. Usery*.[73]

In its Final Judgment, the District Court explained its opinion as "xxx finding that Title I, Section 210

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69. *Ibid.*, Paragraph IV-13, p. 2.

70. *Ibid.*, Paragraph IV-12, p. 2.

71. *Ibid.*, Paragraph V, Count Seven, pp. 3 and 4.

72. App. A, 7a.

73. *Ibid.*, at 5a-7a; 426 U.S. 833, 845, 852 (1976).

of Title II, and Title III of the Public Utility Regulatory Policies Act of 1978 xxx are unconstitutional and void in that they constitute a direct intrusion on integral and traditional functions of the State of Mississipi and violate the Constitution of the United States, especially the Tenth Amendment, the Supremacy Clause [Article VI, Section 2] and a republican form of government as guaranteed by Article IV, Section 4 xxx."[74]

SUMMARY OF ARGUMENT

This district court's decision invalidating all of Titles I and III and Section 210 of PURPA rests on *five* grounds. First, the court held that the statutory provisions are beyond Congress' power under the Commerce Clause because they seek to regulate something which is not "commerce," to regulate the power of the states over commerce, rather than "commerce"; second, PURPA has no rational and substantial relation to the national interest because PURPA's oil saving is so small and speculative that it cannot justify taking over the enactment and administration of state laws, and there is no urgent need to reform state utility regulation; third, PURPA intrudes directly on the integral and traditional functions of the State; fourth PURPA commandeers the regulatory powers of the State of Mississippi, with its personnel and resources, to administer and enforce federal regulatory policies, and imposes affirmative duties on State officials under threat of fine and injunction; and, finally, PURPA violates the guaranty of a republican form of government by enacting state law and violates the Supremacy Clause by seeking to make one law, at the same time, both federal-and-supreme and state-and-inferior.

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74. *Ibid.*, at 8a.

I

The power of Congress over "commerce" is plenary but extends under the Constitution only to "commerce." *Santa Cruz Fruit Packing Company v. National Labor Relations Board*, 303 U.S. 453, 466 (1938). If it were not so, the power of Congress would know no limit: any word in the unabridged dictionary could be defined as "commerce."

II

PURPA does not regulate the utilities in their consumption of oil; it regulates the State regulation of public utilities as to certain rate-making standards, which include advertising, termination of service, lifeline rates, and equitable rates, matters which have nothing to do with conservation of energy. The effect of marginal cost pricing, advocated under PURPA, is uncertain and can result adversely. The saving of imported oil under PURPA is very small and speculative. The legislative record shows that there is no urgent need to reform State utility regulation to save oil. Therefore, PURPA has no rational and substantial relation to the national interest.

III

This case is very much like *National League of Cities v. Usery*, 426 U.S. 833 (1976), in which this Court invalidated the extension of federal minimum wage laws to state employees and asserted the federalism intended by the Tenth Amendment. It was held that the federal laws "would impermissibly interfere with the integral governmental functions" of the State agencies and would alter the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, * * * and parks and recreation. These activities are typical of those performed by state * * * governments in discharging *their dual functions of administering the*

public law and furnishing public services." 426 U.S. at 851. The same is true of PURPA, which severely interferes with the State's function *of administering the public law* by requiring consideration of this federal regulatory program within a limited time, without regard for its impact on the MPSC's handling of its other work.

PURPA is unlike the statute upheld in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, ... U.S. ....., 101 S.Ct. 2352, for two reasons: first, PURPA is compulsory and does not give the States the option not to comply; and, second, Congress could not have pre-empted the right of the States to enact and enforce State laws through State agencies.

PURPA is unconstitutional, therefore, under the requirements of both *National League of Cities* and *Virginia Surface Mining* if the balancing test is applied, the federal interest in saving *zero* barrels of oil is far outweighed by the State's interest in passing and administering its own laws.

IV

This case clearly falls within the condemnation expressed in *Brown v. EPA*, 521 F.2d 827, vacated, 431 U.S. 99 and reinstated in part, 566 F.2d 665 (9th Cir. 1978), against letting Congress commandeer the States and impose affirmative duties on State officials.

V

Each State has the right to enact its own laws, as one of its highest sovereign functions. PURPA uniquely purports to "supplement otherwise applicable state law" and thereby violates the guaranty of a republican form of government and the Supremacy Clause.

ARGUMENT

I

"The Challenged Provisions of the Public Utility Regulatory Policies Act of 1978 Are Within Congress' Plenary Power to Regulate Interstate Commerce"[75]

1. Appellants claim that the district court erred in holding that PURPA is "beyond Congress' power under the Commerce clause because * * * directed at the intrastate operations of public utilities";[76] because that approach erred in not confining the role of the court to determining whether Congress had a rational basis for determining that PURPA's subject matter affected interstate commerce and, if so, whether the means selected by Congress were reasonably adapted to eliminating the burden.[77]

This argument misconceives the points which were argued in the district court and which are presented to this Court for decision:

(1) The first point is stated in the district court's quotation from Mr. Justice Sutherland's holding that "* * * Congress had no power or authority to regulate anything which is not commerce"[78] PURPA attempts to regulate "governance of commerce" rather than "commerce"; to regulate "the power of the states over commerce," rather

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75. Br. 16.

76. Br. 14.

77. Br. 17, citing *Hodel v. Indiana*, ... U.S. ....., 101 S.Ct. 2376 (1981), and *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, ... U.S. ....., 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), hereinafter referred to as *"Virginia Surface Mining."*

78. J.S. 4a, quoting from *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855, at 867 (1935).

than "commerce."[79] "* * * Regulations that this Court can say are not regulations of 'commerce' cannot stand, Santa Cruz Packing Co. v. N.L.R.B., 303 U.S. 453, 466, * * * (1938), and in this sense, '[t]he Court has ample power to prevent * * * "the utter destruction of the State as a sovereign political entity." ' Maryland v. Wirtz, 392 U.S. 183, 196, 88 S. Ct. 2017, 2024, 20 L.Ed.2d 1020 (1968)."[80]

(2) Second, the district court relied at great length on *National League of Cities v. Usery*, 426 U.S. 833 (1976) and stated in its Final Judgment that Title I, Section 210 of Title II and Title III of PURPA "* * * are unconstitutional and void in that they constitute a direct intrusion on integral and traditional functions of the State of Mississippi and violate the Constitution of the United States, especially the Tenth Amendment, the Supremacy Clause [Article VI, Section 2] and a republican form of government as guaranteed by Article IV, Section 4."[81]

(3) Third, the district court ruled that "the sovereign state of Mississippi is not a robot, or lackey which may be shuttled back and forth to suit the whim and caprice of the federal government";[82] thereby, in effect holding that PURPA is unconstitutional as an attempt by Congress to "commandeer the regulatory powers of the states * * *, along with their personnel and resources, for use in ad-

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79. *Brown v. Environmental Protection Agency*, 521 F.2d 827, at 838 and 839 (9th Cir. 1975), vacated, 431 U.S. 99 (1977), reinstated in part, 566 F.2d 665 (9th Cir. 1978); and *District of Columbia v. Train*, 521 F.2d 971, at 989 (D.C. Cir. 1975), vacated, 431 U.S. 99 (1977), reinstated in part and remanded *sub nom., District of Columbia v. Costle*, 567 F.2d 1091 (D.C. Cir. 1977).

80. Mr. Justice Brennan Dissenting in *National Labor Relations Board v. Usery*, 426 U.S. 833, at 860 (1976).

81. J.S. 8a.

82. J.S. 2a.

ministering and enforcing a federal regulatory program. * * *"[83]

This holding is supported by the principle that Congress may not impose affirmative duties upon State officers (*Brown v. Environmental Protection Agency, supra,* 521 F.2d 827, at 841; Hart, "The Relation Between State and Federal Law," 54 Columbia Law Review 514, 515; *Ex Parte Kentucky v. Dennison,* 65 U.S. (24 How.) 66, 110 (1861)); in the absence of constitutional authority therefor such as provided by the Fourteenth Amendment (*Monell v. Department of Social Services of the City of New York,* 436 U.S. 663, 667, 678; and see *Fitzpatrick v. Bitzer,* 427 U.S. 445, 453-456). With deference, Appellants err in contending to the contrary (Br. 30).

Testa v. Katt, 330 U.S. 386 (1947), Br. 29, is not to the contrary: it holds only that, when state courts have jurisdiction under state law to hear certain private claims, arising under state law, they may not refuse to hear a similar private claim for treble damages arising under federal law. It does not hold that the jurisdiction of the MPSC in exercising its *legislative* function of rate-making (*Mississippi Public Service Commission v. Mississippi Power Company,* 366 So.2d 656, 659 (1979)) may be expanded by Congress to consider lifeline rates—which are contrary to the public policy of Mississippi against "unreasonably discriminatory" rates and unlawful, as explained in the Brief of Mountain States Legal Foundation—and federal standards under federal procedure rules; nor does *Testa* hold that the courts of Mississippi must hear appeals by parties granted a federal right of intervention and appeal, or accept the Secretary as an *amicus curiae* as a matter of federal right, under 16 U.S.C. (Supp. III) 2633.

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83. *District of Columbia v. Train,* 521 F.2d 971, 989; *supra,* fn. 79.

We must insist, moreover, that Appellants err in trying to limit the judicial function to determining whether the subject matter of PURPA bears a substantial relation to interstate commerce: "* * * the determinative test of the exercise of power by the Congress under the Commerce Clause is simply *whether the activity sought to be regulated is 'commerce which concerns more States than one' and has a real and substantial relation to the national interest.*"[84]

In other words, the judicial function includes a determination of whether the subject matter of PURPA is "commerce"[85] and, also, in this case, determining whether PURPA represents an exercise of the Commerce Power which is prohibited[86] by some other limitation "* * * prescribed in the Constitution."[87]

The subject matter of PURPA is *State regulation* of intrastate electric and gas utilities and the supplementation of State law to enforce Federal policies: that is obviously not "commerce". As was held in *Brown v. Environmental Protection Agency*: "The *power of states over commerce* has no more been recognized as *Commerce* than has the *power of Congress which is derived from the Commerce Clause.* * * *"[88] (Double emphasis, by the Court). In other words, the exercise by the State Government of its governmental functions of supplementing its laws and enforcing its laws through its own agencies is not "commerce."

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84. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 267 (1964).

85. *Santa Cruz Fruit Packing Company v. National Labor Relations Board*, 303 U.S. 453, 466 (1938).

86. *National League of Cities v. Usery*, 426 U.S. 833 at 845 (1976).

87. *Gibbons v. Ogden*, 9 Wheat. 1, 196 (1824).

88. *Supra*, fn. 79, 521 F.2d at 839.

Such sovereign action is far from "commerce," as that term is generally understood. Mr. Chief Justice Marshall went beyond the usual "dictionary definition of 'commerce' * * * [as] buying and selling or exchange of commodities, involving transportation from place to place,"[89] in *Gibbons v. Ogden*, to state:

> "Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial *intercourse between nations, [*190 and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter."[90]

Appellants quote the findings by Congress on which PURPA was predicated,[91] which are an ipse dixit of the conclusion that certain programs are required. There is, therefore, no proper finding by Congress in PURPA of the factual basis for its action, to allow this Court to evaluate the basis for PURPA. By contrast, compare "the express findings, set out in the act itself, about the effects of surface coal mining on interstate commerce," which are quoted and deferred to in *Virginia Surface Mining*.[92]

Appellants seek to justify PURPA as having a rational basis in the need to solve the nation's energy problems

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89. 15A Am. Jur. 2d, "Commerce", Section 3, p. 320.

90. 9 Wheat. 1, 189 (1824).

91. Br. 18.

92. ..... U.S. ....., 101 S.Ct. 2352, at 2360.

and save foreign oil.[93] We believe that we have shown that there was no serious deficiency in State utility regulation requiring emergency national action[94] and, therefore, disposed of Appellants' claim.

In any event, however, the complete answer is that the "rational basis" portion of the test is never reached because the subject matter of PURPA—supplementing and enforcing State laws—is not "commerce," and because PURPA is unconstitutional on the other grounds set forth in the Final Judgment of the District Court.[95]

2. Appellants claim that "Congress was not irrational in concluding that limited federal regulation of retail sales of electricity and natural gas, was *essential* to prevent 'destructive interstate competition' * * *."[96] We must reiterate that federal regulation was not "essential" enough to pre-empt the field of retail electric rate regulation, or even to pass the mandatory federal standards as to electricity contained in the House version of PURPA; and that federal regulation as to natural gas rates was *not* "essential" enough to require anything as to rates except further study.[97]

II

"The Challenged Provisions of PURPA Do Not Violate the Tenth Amendment"[98]

The district court held PURPA unconstitutional on the grounds that "Title I, Section 210 of Title II and Title III [of PURPA] * * * are unconstitutional and

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93. Br. 19, 20.
94. *Supra*, pp. 7-11.
95. J.S. 8a and 9a.
96. Br. 24.
97. 15 U.S.C. (Supp. III) 3201-3211, J.S. 56a-67a.
98. Br. 25.

void in that they constitute a direct intrusion on integral and traditional functions of the State of Mississippi * * *."[99] The district court relied upon the decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), for this holding and quoted it at length.[100] Therein this Court struck down the 1974 amendments to the Fair Labor Standards Act which expanded the federal wage-hour standards to include nearly all state and municipal employees.

This Court therein held:

> "Our examination of the effect of the 1974 amendments * * * satisfies us that both the minimum wage and the maximum hour provisions *will impermissibly interfere with the integral governmental functions of these bodies.* * * * their application will nonetheless significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their *dual functions of administering the public law and furnishing public services.*[101]

The Court recognized the Tenth Amendment as a limitation prescribed in the Constitution upon the exercise of the Commerce Power[102] and further held:

> "Appellee Secretary argues that the cases in which this Court has upheld sweeping exercises of authority by Congress, even though those exercises *pre-empted state regulation of the private sector*, have already curtailed the sovereignty of the States quite as much

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99. Final Judgment, J.S. 8a and 9a.

100. J.S. 5a and 6a.

101. 426 U.S. at 851.

102. 426 U.S. at 845.

as the 1974 admendments to the Fair Labor Standards Act. We do not agree. *It is one thing to recognize the authority of Congress to enact laws regulating individual businesses* necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. *It is quite another to uphold a similar exercise* of congressional authority *directed, not to private citizens, but to the States as States.* We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Consitution prohibits it from exercising the authority in that manner."[103]

This holding was re-affirmed unanimously by this Court in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*,[104] wherein the issue was the constitutionality of the Surface Mining Control and Reclamation Act of 1977.[105]

SMCRA is described at length by this Court,[106] but is a two stage program which the states may either accept or refuse.

In upholding SMCRA, the Court made crystal clear the distinctions between SMCRA and PURPA (101 S.Ct. at 2366):

"As the District Court itself acknowledged, the steep-slope provisions of the Surface Mining Act *govern only the activities of coal mine operators who are*

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103. 426 U.S. at 844.

104. ..... U.S. ....., 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981).

105. 30 U.S.C. (Supp. III) Section 1201 *et seq.*, hereinafter called "SMCRA."

106. ..... U.S. ....., 101 S.Ct. at 2356, 2357 and 2358.

private individuals and businesses. Moreover, the States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program. Cf. *Maryland v. EPA*, 530 F.2d 215, 224-228 (CA4 1977), vacated and remanded *sub nom. EPA v. Brown*, 431 U.S. 99, 97 S.Ct. 1635, 52 L.Ed. 2d 166 (1977); *District of Columbia v. Train*, 172 U.S. App. D.C. 311, 330-334, 521 F.2d 971, 990-994 (1975), vacated and remanded *sub nom. EPA v. Brown*, 431 U.S. 99, 97 S.Ct. 1635, 52 L.Ed.2d 166 (1977); *Brown v. EPA*, 521 F.2d 827, 837-842 (CA9 1975), vacated and remanded, 431 U.S. 99, 97 S.Ct. 1635, 52 L.Ed.2d 166 (1977)."

Unlike SMCRA, PURPA governs not only activities of public utilities but also compels the activities of States in making and enforcing their laws; commandeering and disrupting the MPSC's administrative processes, and compelling vast expenditure of State funds.

Appellants carefully point out that parts of PURPA escape the Tenth Amendment because "directed not at the states but at public utilities"[107] but admit as to remaining portions—and great majority of PURPA.

"To be sure, *the statute in suit places certain regulatory responsibilities upon the states. Some of the provisions at issue do more than "allow" state regula-*

107. Br. 28, fn. 30.

> *tion.* Portions of Titles I and III *require* state regulatory authorities to "consider" whether or not to adopt and implement certain regulatory standards; the state commissions *must adhere* to certain procedural requirements in considering these standards, *must permit* the Secretary of Energy to participate in the proceedings, and *must report* to the Secretary their progress in the consideration process. Section 210(f)(1) *requires* the state authorities to implement the Federal Energy Regulatory Commission's rules concerning transactions between cogenerators and electric utilities; the Commission is empowered under Section 210 (h)(2) to enforce this statutory responsibility in federal court."[108]

The Commission is empowered to enforce Section 210 by injunction and by mandamus,[109] and/or by forfeitures and penalties.[110]

A more comprehensive description of the duties and burdens imposed by PURPA upon the State of Mississippi is set forth in its Brief, but even Appellants' statement is enough to demonstrate PURPA's violation of the Tenth Amendment.

PURPA, as construed by FERC, required MP&L to furnish extremely expensive marginal cost data as to its operations, in addition to the allocated cost date required by the MPSC and FERC to fix MP&L's rates;[111] and this information is "essential for the carrying out and enforcement of the regulatory scheme contemplated by PURPA."[112] Therefore, it is an integral part of portion

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108. Br. 28, 29.

109. 16 U.S.C. (Supp. III) 825m; MP&L App., 7a.

110. *Id.*, 825n and 825o; MP&L App., 8a and 9a.

111. Affidavit of J. W. Schimpf, Pars. 3-6, J.A. 72-74; 16 U.S.C. (Supp. III) 2643, J.S. 44a.

112. *Id.*, Par. 12, J.A. 76.

of PURPA which is unconstitutional under the Tenth Amendment.

This Court in *Virginia Surface Mining* defined the three-pronged test for unconstitutionality under the Tenth Amendment as follows:

> "It should be apparent from this discussion that in order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the 'States as States.' *Id.*, at 854, 96 S.Ct., at 2475. Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty.' *Id.*, at 845, 96 S.Ct., at 2471. And, third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.' *Id.*, at 852, 96 S.Ct., at 2472."[113]

Note that the Court observed in Footnote 29 thereto:

> "Demonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies State submission. See *Fry v. United States*, 421 U.S. 542, 95 S.Ct. 1792, 44 L.Ed.2d 363 (1975), reaffirmed in *National League of Cities v. Usery, supra*, 426 U.S., at 852-853, 96 S.Ct., at 2474-2475 (1977). See also *id.*, at 856, 96 S.Ct., at 2476 (BLACKMUN, J., concurring."

It is immediately apparent that PURPA violates each portion of this test for the following reasons:

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113. ..... U.S. ....., 101 S.Ct. at 2366.

"A. The Provisions of PURPA Survive the Tenth Amendment Test Established in Virginia Surface Mining."[114]

Appellants claim that "Congress could have pre-empted the states completely in the regulation of retail sales by utilities of electricity and natural gas, and in the regulation of transactions between utilities and co-generators. See *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945)."[115]

We note that Mr. Chief Justice Marshall declared in *Gibbons v. Ogden*:

> That the power of Congress to license vessels "implies no claim of a direct power to regulate the purely internal commerce of a State, or *to act directly on its system of police.*"[116]

And *Houston, East & West Texas Railway Company v. United States* (*Shreveport Rate Cases*), 234 U.S. 342, at 353 (1913), upheld the right of Congress to empower the Interstate Commerce Commission to control intrastate freight rates to the extent necessary to remove unjust discrimination against interstate commerce, but explained:

> *"This is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such,* but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate, carriers may thereby be controlled."

And note the comment by Mr Justice Rehnquist in *Fry v. United States*, 421 U.S. 542, at 551 and 552, Dissenting, that the holding of the *Shreveport Rate Cases* "is not a full answer to the claim of a State that it may not be

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114. Br. 27.

115. Br. 25.

116. 9 Wheat. 1, at 209.

regulated *as a State.*" (Double emphasis by Mr. Justice Rehnquist).

While we doubt that Congress could ever justify pre-empting State regulation of public utilities in order to protect interstate commerce, we must emphatically point out that PURPA does more than just commandeer the State regulatory agencies to enforce Federal policies, PURPA "supplements otherwise applicable state law."[117]
As hereinafter shown,[118] Congress may not constitutionally "supplement" or enact State law. Therefore, Congress could not "take over" the right of the States to enact or supplement their own laws; and the result is the failure of the major premise of Appellants' argument[119] that, because Congress could pre-empt utility regulation, "Congress could choose to allow the States a regulatory role."[120]

1. "The regulation of intrastate activities of electric and gas utilities is not an essential attribute of state covereignty."[121]

This argument again fails to recognize that PURPA "supplements otherwise applicable state laws."[122]

Appellants overlook the fact that the State of Mississippi, prior to 1956, exercised its jurisdiction over public utilities by the use of franchises issued by the appropriate state, county or municipal authorities. See, for instance, the ordinance fixing water rates quoted in *Vicksburg Waterworks Co. v. Vicksburg.*[123]

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117. 16 U.S.C. (Supp. III) Sections 2621(a) and 2623(a); and 15 U.S.C. (Supp. III) Section 3203(a).

118. Point III, p. 47, *infra.*

119. Br. 28, 31.

120. ..... U.S. ....., 101 S.Ct. at 2367.

121. Br. 30.

122. Fn., 1, *supra.*

123. 185 U.S. 65, 69-77 (1901).

Furthermore, *Stone v. Farmers Loan & Trust Co.*, 116 U.S. 307 (1885) and *Simpson v. Shepard* (*The Minnesota Rate Cases*), 230 U.S. 352, at 414 (1912) demonstrate that, since 1885, the State of Mississippi has exercised its police power to fix rates through the MPSC and its predecessor, the Railroad Commission.

Note the direct holding in *Peel v. Florida Department of Transportation* (5th Cir. 1979), 600 F.2d 1070, 1083:

> "Overseeing the transportation system of the state has traditionally been one of the functions of state government, and thus appears to be within the activities protected by the tenth amendment."

To repeat that stated by Mr. Justice Brennan in his Dissenting Opinion in *National League of Cities v. Usery*, 426 U.S. at 875: "Certainly the *paradigm of sovereign action*—action *qua* state—*is the enactment and enforcement of state laws.*" Not only does PURPA "supplement otherwise applicable state law," it also enforces state law by taking over the MPSC and its performance of the legislative function of rate-making.

We will accept Appellants' claim that PURPA was "carefully crafted,"[124] but we submit that the craft was to insure its adoption by concealing the extent of to which it was imposing unpopular pre-emptive features and infringing on the rights of the States. Titles I and III of PURPA take over the legislative rate-making power of the State regulatory agencies and do everything possible to insure the adoption of the Federal standards,[125] even expanding the discretion of the MPSC and requiring the use of "stacked" definitions.[126]

> "2. The challenged provisions do not 'directly impair [the states'] ability "to structure integral operations

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124. Br. 35.

125. Affidavit of C. Keith Howle, Pars. 5-7, J.A. 58 and 59.

126. 16 U.S.C. (Supp. III) 2625.

in areas of traditional functions."' *Hodel v. Virginia Surfact Mining & Reclamation Ass'n, supra,* slip op. 21, quoting from *National League of Cities v. Usery, supra,* 426 U.S. at 852."[127]

The Mississippi Public Service Commission had limited jurisdiction "authorized to act only when and in the manner so provided by the legislature * * *";[128] and it has no jurisdiction as to wholesale sales.[129] Appellants admit that "a sale from a co-generator to a utility is a wholesale transaction (and thus subject to * * * FERC regulation) * * *";[130] and, therefore, seek to expand the jurisdiction of the MPSC.

How far can Congress go in pre-empting the hearing powers of the MPSC for the consideration of these Federal standards? What happens, meanwhile, to the other work that the MPSC is required to perform under State law? The "other work" include the rate cases of MP&L and all the other regulated utilities, which must be promptly heard under State law, because otherwise the MPSC loses jurisdiction.[131]

We do not see how Appellants have the temerity, with deference, to classify the burden of PURPA as "minimal,"[132] especially when it will cost millions of dollars[133] to the rate payers of MP&L and *all* the other utilities regulated by the MPSC—even of water, telephone, and radio

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127. Br. 35.

128. *Mississippi Milk Commission v. Winn-Dixie Louisiana, Inc.*, 235 So.2d 684, 688 (Miss. 1970).

129. *United Gas Corp. v. Mississippi Public Service Commission,* 240 Miss. 405, 127 So.2d 404, 419 (1961).

130. Br. 38.

131. Section 77-3-39, Miss. Code Ann. (1972); MP&L App., 13a.

132. Br. 41.

133. Affidavit of J. W. Schimpf, Pars. 7 and 8, J.A. 74 and 75; Affidavit of C. Keith Howle, Pars. 8 and 17, J.A. 60 and 64.

utilities.[134] And note the statement of the MPSC's Director of Utilities, C. Keith Howle:

> "It is difficult at best to visualize how the Commission could even exist under its limited budget if it is required to comply with PURPA and its Regulations."[135]

Appellants seek to distinguish *Brown v. EPA, supra,* and the EPA cases on the ground that "the provisions of Section 210 and the Commission's regulations thereunder do not compel the states to regulate in an area where they have chosen to remain inactive";[136] but Appellants forget to add the word, "Yes," because Section 210 requires the States to implement "any rule" promulgated or revised by the FERC, *without limitation as to time,* under threat of penalty and injunction.

Therefore, PURPA *does* "impair the States 'ability to function effectively in a federal system.' " *National League of Cities v. Usery, supra,* 426 U.S. at 852, quoting from *Fry v. United States, supra,* 421 U.S. at 547, n.7.

"B. Even Assuming That PURPA Works Some Interference With State Sovereignty, the Federal Interest It Advances Overrides State Interests."[137]

First, we must look carefully at the "talismanic incantation" of national emergency:[138]

(a) Crude oil imports declined from an average of 6,594 thousand barrels per day in 1977, to 6,195 TBD in 1978; and further to 4,217 in 1981.[139] Even if there was

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134. Affidavit of E. W. Robinson, Pars. 2-51, J.A. 67.

135. Affidavit of C. Keith Howle, Par. 9, J.A. 60.

136. Br. 41.

137. Br. 41.

138. *See United States v. Robel,* 389 U.S. 258, at 263 (1967).

139. See DOE, Energy Information Administration, *Monthly Energy Review* at 32 (September 1981)

an emergency shortage of oil during the Oil Embargo of 1973-1974, therefore, it was already on the decline when PURPA was enacted and has now declined below the critical stage.

Although PURPA may have been occasioned by a problem, it was not such a problem as could only be forestalled by action of the National Government.

Aside from the fact that the electric energy consumes less than one-third of the oil consumed in this nation, and the logic that PURPA's encouragement of equitable rates and lifeline rates bears no relation to saving energy, the Department of Energy, itself, forecasts savings in oil import from PURPA by 1985 of from *zero* to 160,000 barrels of oil per day.[140]

The Energy Information Administration, an agency of the Department of Energy recently issued a report as to the effects *by 1990* of *all* the federal energy programs (except the synthetic fuel corporation and the Energy Mobilization Board), and concluded (Executive Summary, page XVII):

> "the Government actions considered in this study [most of the federal energy programs] apparently will together *have only relatively small impacts* on energy supply, consumption, and the average level of energy prices and oil imports in 1990."[141]

TITLES I and III of PURPA do not regulate consumption of oil and natural gas except indirectly by rate regulation. The indirect effect on saving oil of changing rate structures is highly theoretical and speculative as the chairman of the Federal Power Commission said:

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140. *DOE Information Kit: The National Energy Act*, DOE/OPA 0003, page III, "Import Savings."

141. *Energy Programs/Energy Markets*, Government Printing Office, No. 061-003-0144.

"Those who have worked hard for years to administer the Federal Power Commission's mandates under the Federal Power Act and the Natural Gas Act are well aware of the fact that it is usually difficult and frequently impossible to reconcile the requirements and provisions of applicable State and Federal laws and regulations in ways which meet the needs of all concerned.

"A case in point is the lengthy controversy which has surrounded the issue of whether marginal or average pricing should be utilized in setting utility rates.

"In its ratemaking history, the Federal Power Commission has spent years assessing the relative merits of marginal or average pricing of energy. Our most extensive experience with this relates to natural gas pricing, but some general conclusions can be drawn which apply both to electric power and natural gas.

"First, *it is virtually impossible to state with any certainty that either marginal or average pricing will be the most efficient and effective method in all cases. The provisions in the bills now under consideration would strongly encourage marginal pricing.* Exceptions are possible under S. 122 and S. 1300, but only subject to complex procedures.

"Second, *the impacts of broad marginal pricing of utility services can be widespread and adverse, and can result in severe economic, environmental, and personal dislocations, particularly if accomplished in a very short time period.*

"But beyond all other considerations, pricing of energy should be determined by the real costs of producing that energy and supplying it to residential, commercial, and industrial customers alike. Yet, S. 1469 would prohibit declining block rates even when such rates re-

flect true costs and when they have the effect of reducing residential rates. Further distortions to the concept that rates should reflect true costs are created by the so-called "lifeline rates" required by S. 122, S. 1300 and S. 1364. Attempts by the Federal Government to allocate costs on an uneconomic basis among energy customers have proved both difficult and counter productive in the past, and there is no reason to believe that the future will be any different.

In the final analysis, the total body of energy consumers at all levels of consumption are going to have to pay the entire national energy cost, in one way or another. Shifting the burden of cost from residential users to industrial and commercial users merely serves to distort overall energy costs, and means that the ultimate consumer of energy-intensive products and services will be paying indirectly—and possibly more—for his total energy consumption.

"Before a system of Federal mandates such as are contemplated by this legislation is superimposed on the regional and 50-State systems of economic energy regulation, with the probable pre-emption of existing State authority, considerable thought should be given to the potential consequences. I urge some caution, based on my experiences in New York State Government with trying to administer State programs which have been subject to overriding Federal regulations and administration from Washington.

"I have serious doubts about the practicality, and indeed even the possibility, of designing in Washington electric power rate structures which can well serve the needs of the public in all sections of the Nation."[142]

142. S. Rep. 95-442, *supra*, at 36; Statement of Hon. Richard L. Donham.

It is notable that the Ontario Energy Board, after two years of public hearings, rejected marginal cost pricing.[143]

Finally, in response to the argument that action of the National Government is necessary to forestall the energy problem, it is pertinent to comment that arbitary controls and federal regulation substantially contributed to the current problem;[144] and that federal regulation of wholesale electric rates has been officially reported to Congress as being a costly failure by the Chairman of the FERC.[145]

(b) PURPA interferes with integral state functions beyond the "very limited, specific period of time" allowed by *National League of Cities*.[146]

PURPA requires the State regulatory authority to implement the FERC's rules under Section 210 for an unspecified length of time;[147] and also unlimited are the rights of intervention and appeal given the Secretary and consumers.[148]

While it is true that PURPA requires the consideration and adoption of the federal standards not later than the two or three years after the enactment of the statute (or in the first rate case thereafter),[149] the effect of PURPA could continue thereafter for several years during ap-

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143. Ontario Energy Board, *Report to Minister of Energy on Principles of Electricity Costing and Pricing for Ontario Hydro*, H. R. 5, December 20, 1979.

144. Congressman Goldwater, discussing H. R. 8444, 123 Cong. Rec. (daily ed. Aug. 1, 1977), H. 8213; and Congressman Krueger, *Id.*, H. 8204 and 8205.

145. *Decisional Delay in Wholesale Electric Rate Increase Cases: Causes, Consequences and Possible Remedies*, DOE/FERC-0041, Report to Congress, January 23, 1980, 3, 30, 105.

146. 426 U.S. at 853.

147. 16 U.S.C. (Supp. III) 824a-3, J.S. 48a.

148. 16 U.S.C. (Supp. III) 2631 and 2633, J.S. 36a and 40a.

149. 16 U.S.C. (Supp. III) 2622 and 2623, J.S. 22a and 24a.

peals;[150] and the federal standards, themselves, would affect state rate-making for years.

The Secretary admitted, in his Memorandum in the District Court that the purpose of PURPA is to provide "federal levers * * * to promote rate structure reform."[151] The statement of David J. Bardin is that "* * * Congress expressly intends to oversee the programs of the States and, where necessary, to consider additional legislation": there is no limit set on "State accountability," as "a key component of PURPA."[152]

(c) PURPA has not "* * * operated to reduce the pressures upon state budgets rather than increase them."[153]

But, even if the "balancing" approach be applied as contended by the Appellants, we believe that the source of the congressional power expressed in PURPA is the power "to regulate Commerce * * * among the several States," under Art. I, Section 8, cl. 3 of the U. S. Constitution; and, that PURPA is seeking to regulate state governmental activities or "governance" rather than energy use or "commerce" and is, therefore, unconstitutional.

And, in any event, the vital interest of the State in enacting and enforcing its own laws by its regulatory authority and appellate courts, far outweighs the national interest in the slight estimated savings of from *zero* to *160,000* barrels of oil per day.[154]

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150. 16 U.S.C. (Supp. III) 2621, J.S. 18a

151. At p. 16, quoting Sen. Charles Percy, 123 Cong. Rec. (daily ed. Oct. 5, 1977), S. 16423.

152. Implementation Record, p. 553. accord: Conference Report, pages 80 and 81.

153. Fn. 133.

154. Fn. 140.

III

"PURPA Violates the Guaranty of a Republican Form of Government and the Supremacy Clause by Supplementing State Law"

Appellants have wholly omitted from their Jurisdictional Statement and Brief, Article IV, Section 4, the guaranty of a republican form of government, except as it appears in the Final Judgment.[155] It appears in the appendix to our Motion to Affirm.[156] And Appellants have wholly omitted from their Jurisdictional Statement and Brief any discussion of the Supremacy Clause, Article VI.[157]

Their refusal to discuss these separate grounds of unconstitutionality, with deference, will not make the same go away.

We are confronted with Federal statutes which are unique in that they expressly "supplement otherwise applicable state law"[158] and are intended thereby to expand the official discretion of state administrative officials—exercising a legislative function—and state appellate judges.[159] These supplementary state laws "* * * are not clearly defined, and without further elaboration by the DOE * * *, could lead to contradictory policies in the actual setting of electricity rates."[160] This translates to empowering the DOE by change of definition to control the discretion of state officials.

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155. J.S. 9a; Br. 14.
156. MP&L App., 1a.
157. J.S. 12a.
158. Fn. 41, *supra*.
159. Fn. 42, *supra*.
160. Fn. 43, *supra*.

Appellants have admitted that they know of no other supplementary State law[161] and neither do Appellees.

In 82 C.J.S., "Statutes," Section 243, p. 412, it is said: "An amendment [to a statute] has been distinguished from a supplemental act. *A supplemental act signifies something additional added to supply what is wanting* and is that which supplies a deficiency, adds to or completes that which is already in existence without changing or modifying the original."

In *Lost Creek School Township, Vigo County v. York*, 215 Ind. 636, 21 N.E.2d 58, 127 A.L.R. 1287, it is held that "a teachers' tenure statute which is supplementary to previous statutes governing teacher contracts must be construed *as constituting one law* on the entire subject of teachers' tenures." (Headnote 2).

The reason why Congress has not passed any other supplementary laws is their obvious unconstitutionality.

In *Duncan v. McCall*, 139 U.S. 449, 461 (1891), this Court held:

> "By the consitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and *pass their own laws* in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; * * *."

See also *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 547 (1869) (Tenth Amendment) and *Brown v. EPA, supra.*

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161. Answer of Secretary to MP&L's Interrogatory, 10, J.S. 38; Answer of FERC to MP&L's Interrogatory 10, J.S. 48.

The impact of this supplementary state law on the MPSC's performance of its legislative function of rate-making aggravates its unconstitutionality. Note that one of the factors on which the DOE decides to intervene is "regulatory climate,"[162] including political factors and a political conflict as to whether DOE should intervene in the Washington State PURPA hearing."[163]

And even though the Senate at first rejected allowing the federal "energy czar" to appeal the disapproval of a Federal Standard by a State regulatory authority as a "blackjack * * * a hammer to coerce every utility commissioner in the county,"[164] the final version of PURPA allows the Secretary not only to appeal but to appear as an *amicus curiae* as a matter of right.[165]

It is a logical and a constitutional impossibility for a law to be, at one and the same time, federal-and-supreme and state-and-inferior: yet that is what a federal, supplementary state law attempts.

Appellants have admitted that only Congress can repeal or amend this supplementary state law,[166] and that PURPA's provisions "supplement, *but do not override State law.*"[167] This is *not* the language of the statute.

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162. Implementation Record, p. 590.

163. *Id.*, 588 and 589.

164. Sen. Durkin, as floor manager (daily ed. Oct. 6, 1977) 123 Cong. Rec. S. 14683.

165. This is contrary to the rules of this Court (*Northern Securities Co. v. U. S.*, 191 U.S. 555 (1903)) and of Mississippi Courts. (*Burnside v. Burnside*, 228 Miss. 180, 86 So.2d 333 (1956)).

166. Secretary's Answer to MP&L's Interrogatory 8, J.S. 37; FERC's Answer to MP&L's Interrogatory No. 8, J.S. 47.

167. Secretary's Answer to MP&L's Interrogatory 7, J.S. 37; FERC's Answer to Interrogatory No. 7, J.S. 47.

We, therefore, submit that the District Court's finding of unconstitutionality on these two additional grounds was eminently correct.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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